

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of	)	Nos. PLN51498 RUE; PLN51498 VAR
	)	
<b>Tom White</b>	)	
	)	
	)	
For Approval of a Reasonable Use	)	FINDINGS, CONCLUSIONS,
<u>Exception &amp; Zoning Variance</u>	)	AND DECISION

**SUMMARY OF DECISION**

The request for a reasonable use exception, to allow for the development of a single-family residence and associated improvements on an undeveloped 0.2-acre lot that is entirely impacted by critical areas, including a Category II wetland, a Type Ns Stream, and their associated buffers, located at 3935 Lytle Road NE, and for a zoning variance to reduce the required front setback from 25 feet to 20 feet, to allow the proposed residence to be sited closer to Lytle Road NE and further from the on-site critical areas is **APPROVED**. Conditions are necessary to address specific impacts of the proposal.

**SUMMARY OF RECORD**

Hearing Date:

The Hearing Examiner held an open record hearing on the request on September 12, 2022, using remote access technology. The record was left open until September 23, 2022, to allow for the submission of closing briefs from the attorneys representing the City and the Applicant.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

- Annie Hillier, City Associate Planner
- Paul Nylund, P.E., City Development Engineer
- Tom White, Applicant
- Joanne Bartlett, Senior Biologist, Ecological Land Services
- Astolfo Rueda
- Cheryl Laughbon
- Rod Stevens
- Chris Laughbon
- Rebecca Blake
- John Zimmatore
- James Stoner
- Pamela Carpenter
- Greg Spils

*Findings, Conclusions, and Decision  
City of Bainbridge Island Hearing Examiner  
White Reasonable Use Exception and Variance  
Nos. PLN51498 RUE; PLN51498 VAR*

Attorneys Piper Thornburgh and Stephanie Marshall represented the Applicant at the hearing. Attorney James Haney represented the City at the hearing. Attorney Joshua Lane represented neighboring property owner Astolfo Rueda at the hearing.

Exhibits:

A list of the exhibits admitted into the record, and information on the legal briefs and other pleadings, are provided as Attachment A, attached to this decision.

The Hearing Examiner enters the following findings and conclusions based on the admitted testimony and exhibits:

**FINDINGS**

Application and Notice

1. Tom White (Applicant) requests approval of a reasonable use exception (RUE) to allow for the construction of a single-family residence on an undeveloped 0.2-acre lot that is entirely impacted by critical areas, including a Category II wetland, a Type Ns stream, and their associated buffers. The Applicant also requests a variance from the requirements of Bainbridge Island Municipal Code (BIMC) 18.12.020 to reduce the required front setback from 25 feet to 20 feet to allow the proposed residence to be sited closer to Lytle Road NE and further from on-site critical areas and buffers. The proposed single-family residence would have a total building footprint of 868 square feet when including cantilevered portions of the home and decks. Associated improvements would include a pervious pavement driveway providing access from Lytle Road NE and an on-site septic system. The proposed primary septic drainfield would be located between the residence and Lytle Road NE, as far from critical areas and buffers as possible. To that end, the drainfield would be outside of a 50-foot buffer associated with a Type Ns stream but within a 75-foot buffer associated with a Category II wetland. The Applicant proposes to locate a reserve drainfield within an easement area at the northeast corner of the adjacent property to the north, which is also owned by the Applicant. The property is located at 3935 Lytle Road NE.<sup>1</sup>

The RUE would allow for development of a single-family residence and associated improvements within the wetland and stream buffers on the property, not to exceed 1,200 square feet in lot coverage. As mitigation for the approximately 2,695 square feet of wetland buffer and stream buffer that would be permanently impacted by the proposal, the Applicant proposes to enhance 157 feet of the on-site wetland and 3,349 square feet

---

<sup>1</sup> The property is identified by tax parcel number 41640060010208. *Exhibit 1, Staff Report, page 1.*

of wetland buffer and stream buffer areas through the planting of native trees and shrubs. The Applicant also proposes to preserve 2,661 square feet of high-functioning vegetated buffer areas on-site, located to the west of the on-site stream and wetland. In addition, the Applicant proposes to install stainless steel cable fencing along the edge of the designated buffer area to limit human intrusion while still allowing for wildlife passage. *Exhibit 1, Staff Report, pages 1 through 6, 8 through 13, and 16; Exhibit 2; Exhibit 3; Exhibit 7; Exhibit 13; Exhibit 14; Exhibit 16; Exhibits A-1 through A-5; Exhibit A-22; Exhibit A-23; Exhibit A-28.*

2. The City of Bainbridge Island (City) determined that the application was complete on May 17, 2021. On May 28, 2021, the City provided notice of the application and associated open record hearing by mailing or emailing notice to property owners within 500 feet of the subject property and to reviewing government departments and agencies, publishing notice in the *Bainbridge Island Review*, and posting notice at designated City locations, with a comment deadline of June 18, 2021. The Applicant posted notice on the property the same day.

The City later determined that the tentative hearing date would have to be postponed due to a lack of sufficient information and Kitsap Public Health District approval, and, on April 21, 2022, the City emailed notice of the rescheduled hearing to members of the public who provided comments on the proposal. The next day, the City provided notice of the rescheduled hearing by mailing notice to property owners within 500 feet of the subject property, publishing notice in the *Bainbridge Island Review*, and posting notice at designated City locations. The same day, the Applicant posted notice of the rescheduled hearing on the property. The rescheduled hearing was again postponed following a request by the Applicant, and, on August 26, 2022, the City provided notice of the new hearing date in the same manner. The Applicant posted notice of the new hearing date on the property the following day. The City received several comments on the proposal from members of the public in response to its notice materials, which are discussed in detail later in this decision. *Exhibit 1, Staff Report, page 7; Exhibit 5; Exhibit 6; Exhibit 8; Exhibit 9; Exhibits 23 through 26; Exhibit 28; Exhibit 30.*

#### State Environmental Policy Act

3. City staff determined that the proposal is exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), in accord with Washington Administrative Code (WAC) 197-11-800(6)(a). Specifically, the proposal is exempt from SEPA review because it would involve the construction of one single-family residence. *WAC 197-11-800(1)(b)(i)*. In addition, *WAC 197-11-800(6)(e)* provides that variances “based on special circumstances, not including economic hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use of

density” are categorically exempt from SEPA review. *Exhibit 1, Staff Report, pages 1 and 21.*

#### Comprehensive Plan, Zoning, and Surrounding Property

4. The property is designated as “Residential District” under the City Comprehensive Plan. The purpose of the City’s Residential District designation is to promote low-impact residential development that reconciles development and conservation. *City Comprehensive Plan, page LU-22.* City staff analyzed the proposal and determined that it would be consistent with the goals and policies of the Comprehensive Plan, including the Land Use Element, the Environmental Element, and the Water Resource Element. *Exhibit 1, Staff Report, pages 5 and 8.*
5. The 0.2-acre subject property is within the “Residential 2” (R-2) zoning district. The purpose of the R-2 zoning district is to “provide residential neighborhoods in an environment with special Island character consistent with other land uses such as agriculture and forestry, and the preservation of natural systems and open space, at a somewhat higher density than the R-1 district.” *BIMC 18.06.020.C.* Single-family dwellings are a permitted use in the R-2 zone. *BIMC Table 18.09.020. Exhibit 1, Staff Report, page 8.*
6. Dimensional standards for the R-2 zone require a minimum lot area of 20,000 square feet per dwelling unit, a minimum lot depth and width of 80 feet, and a maximum lot coverage of 20 percent. *BIMC Table 18.12.020-2.* Setback requirements include minimum front lot line setbacks of 25 feet, minimum rear lot line setbacks of 15 feet, and side lot line setbacks of at least 5 feet, with a minimum of 15 feet total side setbacks. *BIMC Table 18.12.020-2.* Two parking spaces are required for each primary dwelling. *BIMC 18.15.020.C. Exhibit 1, Staff Report, pages 8 and 9.*
7. The Applicant’s project plans show that the proposed driveway would be adequate to support the required two parking spaces. The 8,500 square foot property is approximately 65 feet wide and 132 feet long and, therefore, is legally nonconforming with the minimum lot area and lot width requirements currently applicable to properties in the R-2 zoning district. *BIMC Table 18.12.020-2; BIMC 18.30.050.* Because a RUE is proposed, lot coverage would be limited to 1,200 square feet under BIMC 16.20.080.F.6, which is less than the 1,700 square feet of maximum lot coverage that would be typically allowed for the 0.2-acre property under the 20 percent maximum lot coverage requirement. *BIMC Table 18.12.020-2.* As noted above and discussed in detail below, the Applicant requests a variance from the 25-foot front setback requirement to allow the proposed residence to be sited as far from critical areas and their buffers as possible. *Exhibit 1, Staff Report, pages 1, 2, 8, 9, 16, and 20 through 23; Exhibit 3; Exhibits 13 through 15.*

*Findings, Conclusions, and Decision  
City of Bainbridge Island Hearing Examiner  
White Reasonable Use Exception and Variance  
Nos. PLN51498 RUE; PLN51498 VAR*

8. Properties to the north, west, and south of the subject property are also within the R-2 zoning district and are developed with single-family residences. Properties to the east, across Lytle Road NE, are zoned “Residential 1” (R-1) and are developed with single-family residences. *Exhibit 1, Staff Report, page 5.*

#### Existing Site and Critical Areas

9. The 0.2-acre subject property and the approximately 0.66-acre adjacent property to the north are part of the Pleasant Beach Tracts, which was platted in 1913. Although the platting history of the properties is not well documented, the City’s Survey Program Manager determined that both parcels are considered legal lots. In 2005, the previous owner of both lots applied for a RUE to allow construction of a single-family residence on the southern subject parcel, with an associated septic system to be located on the then-undeveloped northern parcel. In support of the 2005 RUE request, Professional Wetland Scientist Joanne Bartlett, then of Wiltermood Associates, Inc., prepared a Wetland Analysis Report and Buffer Enhancement Plan addressing both properties, dated October 7, 2004 (“2004 Wetland Report”). The 2004 Wetland Report determined that proposed mitigation in the form of enhancing vegetation in the stream buffer in the northern half of the properties would improve wildlife habitat, provide adequate protection for the stream, and comply with applicable requirements of the City’s critical areas ordinance. *Exhibit 1, Staff Report, page 2; Exhibit 12; Exhibit 17; Exhibit 18; Exhibit A-4; Exhibit A-6; Exhibit A-7; Exhibit A-26.*
10. The original 2005 RUE proposal was reviewed by the city’s Wetland Advisory Committee at a preapplication conference on January 11, 2005, and at a meeting held on March 8, 2005. Based on recommendations by the Committee, the project proponent revised the proposal to relocate the proposed single-family residence and all associated infrastructure to the northwest portion of the northern parcel, with no construction proposed on the southern parcel. Following this revision, Ms. Bartlett prepared an addendum to her 2004 Wetland Report. The addendum stated that the “stream and buffer enhancement plan has been revised in response to the new site plan and basically proposes the same enhancement but the planted area will now be in the southern rather than the northern half of the stream.” The addendum does not clarify whether or to what extent mitigation would occur on the southern parcel, and Ms. Bartlett could not provide clarification on this issue at the open record hearing. She did confirm at the hearing, however, that the revised mitigation plan from 2005 (the addendum to the 2004 Wetland Report) appears to show that mitigation plantings would occur on the southern parcel. The addendum and revised mitigation plan do not document the extent of mitigation plantings that occurred on the southern parcel or whether such plantings on the southern parcel were necessary to meet mitigation requirements for impacts from development on the northern parcel. *Exhibit 1, Staff Report, page 2; Exhibit 17; Exhibit 18; Testimony of Ms. Bartlett.*

11. The City's staff report, dated April 26, 2005, analyzing the 2005 RUE request, as revised, referenced only the 0.66-acre northern lot and recommended approval of the RUE application subject to several conditions. On May 3, 2005, the City Department of Planning and Community Development Director approved the RUE application and issued a Mitigated Determination of Nonsignificance (MDNS), which incorporated the conditions recommended by City staff. The decision conditionally approving the 2005 RUE request described the proposal as including two lots totaling 0.84 acres and, as relevant to the current RUE request, imposed the following mitigation measures and conditions:

1. In order to protect the remaining functions and values of the stream and wetland, the property shall be divided into a disturbance zone and an [sic] no-disturbance/restoration zone as depicted on the site plan date stamped February 17, 2005 and attached as Attachment B. Uses within the disturbance [zone] shall be those normally associated with a single-family residence (i.e., house, garage, drainfield, driveway, landscaping, etc.). Within the no-disturbance/restoration zone, only restorative native planting, passive recreation (passive trails, bird watching etc.) and stormwater infiltration shall be allowed. . . .

...

12. A notice on title in accordance with BIMC 16.20.130 shall be recorded on this property prior to building permit issuance. The notice shall include all the conditions of this Reasonable Use Exception (Condition #12).

13. A final mitigation plan shall be submitted and approved by staff prior to issuance of the building permit. The plan shall include restoration of the remaining buffer area and shall incorporate the comments provided by the Wetland Advisory Committee. Specifically the plan shall provide a greater diversity of herbaceous plants along the bank of the drainage course and the size of the individual plants should be increased [to] size-two gallon plants. The mitigation planting shall be completed or bonded prior to final inspection of the building permit for the house.

14. The mitigation plan shall include provisions for a five-year monitoring program. A restoration monitoring assurance device shall be submitted at the completion of the restoration and shall be held for the five-year monitoring period.

The 2005 RUE decision did not require consolidation of the two lots and did not impose any conditions explicitly restricting future development on the southern parcel. The site plan referenced in Condition 1, above, depicts a “disturbance zone”—i.e., the buildable area of the lot—in the northwestern portion of the northern parcel and a “no-disturbance/restoration zone” on the remaining southern half of the northern parcel. The southern parcel is shown on the site plan, but the site plan does not designate any areas within the southern parcel as within a no-disturbance/restoration zone. As required by the 2005 RUE decision, a critical areas buffer notice to title was recorded on both properties, which included the conditions and mitigation measures imposed with the decision, along with the site plan as described above.

Following the 2005 RUE approval, the Applicant purchased both parcels in January 2006. Joanne Bartlett submitted monitoring reports addressing the success rate of mitigation plantings on: November 30, 2007; December 5, 2008; November 24, 2009; and November 8, 2010. The monitoring reports appear to show that mitigation plantings associated with the 2005 RUE occurred on the southern parcel that is the subject of the current RUE request but, as with the other materials submitted with the current application, the reports do not specify the extent of the mitigation plantings that occurred on the southern parcel or indicate whether such plantings were necessary to meet mitigation requirements for impacts from the development on the northern parcel. Moreover, Ms. Bartlett could not recall the location of mitigation plantings in relation to the property line separating the two parcels. *Exhibit 1, Staff Report, page 2; Exhibits 18 through 22; Exhibits A-1 through A-3; Exhibit A-15; Exhibit A-16; Exhibit A-25; Testimony of Ms. Bartlett.*

12. As noted above, the 0.2-acre subject property (i.e., the southern property) is currently undeveloped and is accessed from Lytle Road NE, which borders the property to the east. Vegetation throughout the property consists of emergent and scrub/shrub vegetation. The site topography slopes moderately from the east and west down to the middle of the property, where a Type Ns, non-fish bearing seasonally flowing stream channel with a required 50-foot protective buffer is present. The stream originates offsite to the north of NE Beck Road, is tightlined underneath the road, and then daylights midway through the adjacent property to the north. The stream channel flows on-site near the middle of the northern property line, continues southwest across the property, and exits near the southwestern corner of the property. A Category II wetland with a required 75-foot protective buffer is located mostly on the adjacent property to the north but extends onto the northern portion of the subject (southern) property.

Joanne Bartlett, now of Ecological Land Services, prepared a Critical Areas Report and Mitigation Plan for the proposed project, revised May 12, 2021 (“2021 Wetland Report”). The 2021 Wetland Report determined that the entire property is impacted by critical areas, including the on-site stream, the wetland, and their associated buffers and that,

therefore, a RUE would be required for the proposed single-family residential development. The report further determined that the proposed development would not result in any direct impacts to the wetland or stream but that impacts to the associated buffers could not be avoided because they extend over the entire property. As noted above, as mitigation for the approximately 2,695 square feet of wetland and stream buffer that would be permanently impacted by the proposed development, the Applicant would enhance 157 feet of the on-site wetland and 3,349 square feet of wetland and stream buffer areas through the planting of native trees and shrubs. The Applicant would also preserve 2,661 square feet of high-functioning vegetated buffer areas located to the west of the on-site stream and wetland. In addition, the Applicant proposes to install stainless steel cable fencing along the edge of the designated buffer area to limit human intrusion while still allowing for wildlife passage. Ms. Bartlett determined in her report that the proposed mitigation would provide a functional lift for the critical areas and remaining buffer areas and that the project would result in no net loss of ecological functions. It is, however, unclear from the 2021 Wetland Report whether the proposed mitigation for *this* project would overlap with mitigation that was required for the previous 2005 RUE approval (as determined by Ms. Bartlett in the 2004 Wetland Report). *Exhibit 1, Staff Report, pages 5, 19, and 20; Exhibit 16; Exhibit A-21; Exhibit A-22.*

13. The municipal code identifies aquifer recharge protection areas (ARPAs) as critical areas that must be protected. BIMC 16.20.100.E.1 generally states that any proposed development or activity requiring a site assessment review located within the R-2 zone requires designation of an ARPA. Under BIMC 16.20.100.E.1.d, however, if 65 percent of a property would be protected in perpetuity by a legal instrument acceptable to the City attorney and would otherwise meet the requirements for an ARPA, no such designation is required. Here, the on-site wetland, stream, and remaining buffer areas would occupy over 65 percent of the subject property and would be protected in perpetuity. Accordingly, an ARPA need not be designated. The Applicant would be required to record a notice to title in order to document the presence of critical areas and buffers on-site consistent with the requirements of BIMC 16.20.070.G. *Exhibit 1, Staff Report, pages 18, 19, and 29.*

#### Reasonable Use Exception

14. The municipal code provides for a reasonable use exception (RUE) where the City's critical areas ordinance (Chapter 16.20 BIMC) would deny all reasonable use of the property; where there are no reasonable alternatives with less impact on the critical area or its required buffer; where the proposal minimizes the impact through mitigation sequencing; where the proposed impact is the minimum necessary; where the inability to derive reasonable use of the property is not the result of actions by the Applicant; where the proposed total lot coverage does not exceed 1,200 square feet for residential development; where the proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property; where any alterations are mitigated;



where the proposal ensures no net loss of critical area functions and values consistent with best available science; where the proposal addresses cumulative impacts of the action; and where the proposal is consistent with all other applicable regulations and standards. *BIMC 16.20.080.F.*

15. As noted above, the Applicant proposes construction of a single-family residence that would have a total building footprint of 868 square feet when accounting for deck areas and cantilevered portions of the residential structure, with associated improvements that would include a pervious pavement driveway and on-site septic system. To minimize impacts to the critical areas and associated buffers, the residence, driveway, and primary septic drainfield would be sited in the eastern portion of the property as far as feasible from the Type Ns stream and its buffer. The Applicant proposes to locate a reserve septic drainfield within an easement area at the northeast corner of the adjacent property to the north (i.e., the Applicant's property that received RUE approval in 2005). As proposed, the single-family residence, driveway, and primary septic drainfield would be located entirely within the 75-foot buffer associated with the Category II wetland, and a portion of the residence and driveway would be located within the 50-foot buffer associated with the Type Ns stream. *Exhibit 1, Staff Report, pages 1 through 6; Exhibit 3; Exhibit 7; Exhibit 7; Exhibit 13; Exhibit A-28.*
16. Paul Nylund, the City's Development Engineer, reviewed the proposal and determined that it would be consistent with applicable stormwater regulations and that the proposal would protect the critical area functions and values consistent with the best available science as it pertains to the incorporation of LID techniques for the purpose of handling of stormwater, retaining vegetation, and mimicking natural hydrology to the maximum extent feasible. Furthermore, he determined that the site plan conforms to the City's Design and Construction Standards and Specifications. Mr. Nylund provided several recommendations about site development and construction that City staff determined should be incorporated as conditions if the Hearing Examiner were to approve the current RUE request. The Applicant has proposed to locate the septic transport line to the reserve drainfield within the municipal right-of-way due to presence of the no-disturbance/restoration zone on the adjacent northern parcel.

In light of the Applicant's proposal to utilize the city right-of-way for this purpose, Mr. Nylund's review memorandum provides the following recommended condition:

In the event that the reserve septic drainfield becomes necessary, the applicant must explore alternatives to locating the septic transport line in the Right of Way (ROW). Concurrence from [City] Public Works shall be required prior to installation within the ROW. The use of ROW for private utilities is a deviation from current standards that would be

considered but is not generally approved, and future approval of such an alignment is in no way guaranteed by this decision.

*Exhibit 1, Staff Report, pages 2 and 8; Exhibit 11.*

17. The Bainbridge Island Fire District reviewed and approved the proposal, without conditions. Kitsap Public Health District also reviewed and approved the proposal, without conditions. *Exhibit 1, Staff Report, page 8.*

18. The Applicant submitted a project narrative addressing the criteria for a RUE under BIMC 16.20.080.F. The project narrative asserts that the proposal would meet the criteria for a RUE because:

- The subject lot is encumbered to such an extent by critical areas and critical area buffers that application of the land use codes would deny all reasonable use of the property.
- Reasonable use of the property cannot be achieved through buffer modification or a habitat management plan.
- Alternatives to development through a [RUE] are not available or acceptable.
- The proposed development [of a single-family residence] minimizes the impact to the critical areas by siting the house and septic field as close to Lytle Road and as close to the south property line as possible.
- Any alterations permitted to the critical area are mitigated in accordance with mitigation requirements applicable to the critical area.

*Exhibit 15.*

19. City staff analyzed the proposal and determined that it would not comply with the criteria for a RUE based on the previous 2005 RUE approval for the development on the adjacent parcel to the north. Specifically, City staff determined that the Applicant gained a reasonable use of the subject property when it was included in the 2005 RUE approval as part of a joint development with the parcel to the north. City staff notes that the 2005 RUE approval did not intend to leave open the possibility of obtaining a second RUE for development on the subject southern parcel because this parcel was used to mitigate impacts from the development on the northern parcel.

City staff further notes:

- As described in the critical areas report and mitigation plan, the stream, wetlands, and corresponding buffers cover the entire property. Buffer modification would allow the buffers to be reduced up to 25 percent of its required width, and if the subject property is viewed in isolation and not as part of a joint development under the 2005 RUE, modification would not allow reasonable use because of how much of the site is encompassed by the critical area buffers. A Habitat Management Plan is not applicable to the development proposal or site. The only

*Findings, Conclusions, and Decision  
City of Bainbridge Island Hearing Examiner  
White Reasonable Use Exception and Variance  
Nos. PLN51498 RUE; PLN51498 VAR*

way for the Applicant to develop the subject property with a single-family residence is through a reasonable use exception.

- A transfer of development rights (TDR) has been brought up by members of the public as a potential alternative to development of the subject property. Because identifying receiving sites for a City TDR program is not anticipated to occur until the next Comprehensive Plan update, inclusion in a TDR program is not currently feasible. Additionally, City staff believes that a TDR would not be relevant because the parcel was already the subject of a RUE.
- The 2005 RUE authorized a single-family residence and associated mitigation on a single site consisting of two parcels. The single-family residence and its appurtenances were supported on one parcel, and mitigation plantings to offset direct impacts to the critical areas were located on the second (subject) parcel. The two parcels were thus jointly developed, and the 2005 RUE provided a reasonable use for both parcels. The intent of the 2005 RUE was not to leave open the possibility of a second, future RUE on a portion of the same two-parcel site, though it is noted that the two parcels were not required to be aggregated as a condition of approval. Mitigation was installed and monitored on the subject parcel, but the extent of the critical area mitigation encumbrance is not entirely clear. At the time of the 2005 RUE approval, the mitigation area was required to be protected and managed to provide for “long-term persistence,” as described in Ordinance No. 92-07 (Exhibit 19). Application of the City’s current Critical Areas Ordinance does not interfere with the long-term maintenance of the mitigation area on the subject parcel, and, therefore, the Applicant is not denied all reasonable use of the property.
- If additional measures to minimize impacts are imposed, the project could meet the requirement for minimizing impacts to critical areas in accordance with mitigation sequencing under BIMC 16.20.030.
- If the Hearing Examiner disagrees with City staff’s determination that the subject property was part of a joint development with the parcel to the north under the 2005 RUE, the proposed layout appears to be the minimum necessary to allow residential use of the property because the proposed development, including the septic drainfield, would be located as far from the stream and wetland edge as possible. With conditions, the proposal could meet the requirement that the proposed impact to the critical areas would be the minimum necessary to allow for a reasonable use of the property.
- The subject parcel and the parcel immediately to the north were sold to the Applicant in 2006, after the 2005 RUE was obtained by the Applicant’s predecessor to authorize a single-family residence and critical areas mitigation on the two parcels. The RUE was reviewed under the Environmentally Sensitive Areas Ordinance, Ord. No. 92-07, approved on February 20, 1992. The Applicant gained reasonable use of both parcels by constructing a single-family residence on

the northern parcel and committing to mitigate the environmental impacts to critical areas on the subject southern parcel.

- Under BIMC 18.12.050, lot coverage means that portion of the total lot area covered by buildings, excluding up to 24 inches of eaves on each side of the building, any building or portion of building located below predevelopment, and finished grade. The proposed single-family residence entails a building footprint, including cantilevered portions, and decks totaling 868 square feet. The lot coverage would not exceed 1,200 square feet, and final calculations must be provided with the building permit application.
- Concerns were expressed by some members of the public that construction this close to critical areas would reduce the capacity of the site to control water flow, thereby exacerbating flooding during extreme weather events. Flooding in this area appears to be more attributable to historical and existing hydrologic conditions and to minimal stormwater management facilities along Lytle Road NE, than area development. The construction of a house, driveway, and decks adds impervious surfaces and increases surface runoff. If additional measures are imposed to ensure that stormwater runoff on the site is managed according to Chapter 15.20 BIMC, and to ensure that any flood management functions provided by the stream and wetland are retained or enhanced, the proposal may not pose an unreasonable threat to the public health, safety, or welfare on or off the property.
- Although there are no prescriptive mitigation requirements for wetland buffers, the mitigation plan is required to contain goals and objectives that are related to the functions and values of the original critical areas, in accordance with BIMC 16.20.180.G.3.b. As described in the critical areas report and mitigation plan, the project goal is to “Improve water quality and quantity; habitat; and noise and light dampening functions within the buffer to compensate for construction within the buffer.” The critical areas report and mitigation plan proposes accomplishing this goal by controlling invasive plant species while improving native plant cover and the overall function of the buffer.
- The wetland rating report and mitigation plan was reviewed by a project planner with an advanced degree in landscape architecture and field experience in natural resources and ecosystem management who found it would protect critical area functions and values consistent with best available science. City staff notes, however, that the proposed mitigation area overlaps with the mitigation installed to compensate for impacts from the development authorized under the 2005 RUE. Under the 2005 RUE, mitigation was installed along each side of the stream, within the 25-foot buffer that then existed. At the time of approval, this area was required to be protected and managed to provide for “long-term persistence,” as described in Ordinance No. 92-07 (Exhibit 19). Mitigation is currently proposed within portions of this same area, as well as outside of it, which is not typical.

- When mitigation is required to compensate for impacts to a critical area buffer, it is routinely directed to and approved for areas where mitigation has not previously occurred, at a one-to-one ratio or greater. The current mitigation plan does not address the effect of a shared mitigation area on the no net loss requirement. It is also not clear if there is enough mitigation proposed outside of the areas where mitigation previously occurred to offset impacts from the current proposal. City staff recommends that the Applicant provide a revised mitigation plan demonstrating that the required mitigation for this proposal can be met without use of the previous mitigation area.
- Cumulative impacts are the combined environmental impacts that accrue over time and space from a series of similar or related individual actions or projects. The proposal does not address the cumulative impact of a second residential use on the same wetland and stream system as the 2005 RUE, or how the proposal contributes to current and anticipated impacts to these critical areas. A revised mitigation plan or other analysis would be required to demonstrate how the proposal addresses cumulative impacts.

*Exhibit 1, Staff Report, pages 2, 3, and 10 through 18.*

#### Variance

20. As noted above, the Applicant also requests a variance to reduce the required front setback from 25 feet to 20 feet to allow the proposed residence to be sited as far from the on-site critical areas as possible. City staff analyzed the proposal for compliance with the variance criteria of BIMC 2.16.060.D and determined:
- Should the RUE be approved but the variance denied, the impacts on the critical areas would be increased. By decreasing the encroachment on critical area buffers, the zoning variance would decrease the direct impact to critical areas and their buffers. Due to the width of the primary septic drainfield and its placement between the single-family residence and Lytle Road NE, the proposed front setback reduction cannot be greater than 5 feet. As a result, there would still be a setback of 20 feet from the edge of Lytle Road NE to the proposed single-family residence.
  - The variance is requested because of the critical areas and associated buffers on the subject property.
  - The need for the variance is primarily related to the critical areas and not from previous actions taken or proposed by the Applicant.
  - The City considers the reduction in the front setback, which is an impact minimization step, a significant part of satisfying the RUE decision criteria related to minimizing impacts, which is necessary in order to develop the property with a single-family residence. The applicability of the 2005 RUE aside, the variance is necessary for the enjoyment of a substantial property right possessed by other properties in the vicinity, as other properties in the vicinity are developed with single-family residences.

*Findings, Conclusions, and Decision  
City of Bainbridge Island Hearing Examiner  
White Reasonable Use Exception and Variance  
Nos. PLN51498 RUE; PLN51498 VAR*

- The variance would not be consistent with all other provisions of the municipal code because the proposal would not meet all applicable RUE criteria.

*Exhibit 1, Staff Report, pages 22 and 23.*

#### Written Public Comments

21. As noted above, the City received numerous written comments on the proposal from members of the public in response to its notice materials. These comments generally related to the following topics:
- **Impacts to Wildlife Habitat:** Comments on this topic generally noted the value of the subject property and the parcel to the north and raised concerns that the proposed development would impact wildlife and the community's ability to view wildlife. For example, Manda Bair, Lissa Beytebiere, Holly Brewer, Nora Carlson, Pam Churchill, Kori Clot, Bonny Danielson, Judy Katilus, Heidi Langendorff, Chris Laughbon, Cheryl Laughbon, Jane Pearson, Rod Stevens, and Oriana von Specht raised concerns that the proposal would damage wildlife habitat.
  - **Impacts to Water Quality:** Comments on this topic generally raised concerns that the proposed development could negatively impact water quality. For example, Manda Bair and Nora Carlson raised concerns that the proposal would have detrimental effects on wetlands and could result in sewage entering Lytle Creek. Lissa Beytebiere, Steve Borgstrom, Holly Brewer, Pam Churchill, Emily Crandall, Bonny Danielson, Lily Diament-Hansen, Lesley Higgins, Vicki Johnson, Judy Katilus, Dane Keehn, Heidi Langendorff, Chris Laughbon, Cheryl Laughbon, Matthew Malouf, Jane Pearson, Brian Strause, and Amy Decker raised similar concerns about the proposal's potential impacts to wetlands and water quality. Doug Forsyth noted that he did not object to the proposal but requested that it be appropriately reviewed to ensure that it would not adversely impact water quality for downstream properties.
  - **Impacts to Existing Flooding Issues:** Comments on this topic generally raised concerns that the proposal could exacerbate existing flooding issues to downslope neighboring properties, particularly during extreme weather events. For example, Holly Brewer noted that the Applicant has caused flooding issues to neighboring properties from past development and that this will likely occur again with the current proposal. Vicki Johnson, Judy Katilus, Attorney Joshua Lane (on behalf of Astolfo Rueda), Jane Pearson, Charlotte Rovelstad, Kay Walsh, and Janice Wells raised concerns that the proposed development would increase water flow to properties that already experience flooding issues.
  - **Impacts to No-Disturbance Zone on Adjacent Property to the North:** Comments on this topic raised concerns that the proposal would require construction within the no-disturbance zone on the adjacent property to the north. For example, Nora Carlson, Pam Churchill, Emily Crandall, Chris Laughbon,

Cheryl Laughbon, and Oriana von Specht, expressed concerns that the project would include a sewage line through the no-disturbance zone.

- **Impacts to Existing Character of Neighborhood:** Comments on this topic generally raised concerns that the proposed residential structure and its proximity to Lytle Road NE would detract from the character of the surrounding neighborhood. For example, Chris Laughbon and Cheryl Laughbon, expressed concerns that the proposed residence and a four-foot-tall wall for the septic system would be unsightly and would not be consistent with the character of the neighborhood. Rod Stevens noted that approving the reduced setback from Lytle Road NE would impact the rural character of the neighborhood.
- **General Opposition to Proposal:** Several members of the public, including Robert Bosserman, Robert Drury, Roberta Dueno, Kathryn Keve, Peter King, Emily Magnotto, Roberta Nelson, Janelle Perreira, Beth Balas, Janet See, Bill Reddy, Linda Shadwell, Erika Shriner, Mark Shriver, Greg Spils, Sharon Spivey, John Van Dyke, Alice Maher, and Cheryl Tlam expressed general opposition to the proposal and requested that it be denied.
- **Support for the Proposal:** Several members of the public expressed support for the proposal. For example, Jamie Berg stated that he supports the proposed development, noting that it would not adversely impact wetlands or exacerbate existing flooding issues if properly designed and constructed. David Berg also voiced support for the proposal, noting the need for additional housing in the city. Scott Roth similarly expressed support for the proposal, noting that the Applicant should be allowed to develop his private property and that the mitigation plan would increase vegetation diversity and habitat function. Other members of the public expressing support for the proposal include Anne Browne, Kitty Grant, David Hooyer, Tom Jinks, Crosby Olsen, and Dorothy Anne Minter.

*Exhibit 1, Staff Report, pages 25 and 26; Exhibit 9; Exhibit 28; Exhibit 30.*

22. City staff provided responses to the concerns raised by members of the public, which note:

- It is likely that the proposed location for the residence would block views of wildlife on the property from Lytle Road. This proposed location, however, would likely be the least impactful to the habitat corridor that this parcel and the Applicant's adjacent property create. The critical areas report and mitigation plan address impacts to wildlife habitat directly and seek to improve habitat function of the site by cultivating a denser and more diverse forest cover.
- Comments on the project's water quality impacts primarily focused on the potential for the septic field to fail, the proximity of sources of runoff to the wetland, and the existing water quality issues at the beach located at the south end of Lytle Road, where a sewer outfall is also located. The critical areas report and mitigation plan address water-related functions of the site and seek to improve that functionality through critical area and buffer enhancement.

- The project takes place upland of residents who have experienced property damage from floods on their property during extreme weather events. The flooding in the area appears to be due in part to the historical and existing hydrological conditions and in part to the lack of stormwater management facilities along Lytle Road NE. The City Development Engineer determined that the proposal would protect the critical area functions and values consistent with the best available science as it pertains to the incorporation of low impact development (LID) principles for the purpose of handling of stormwater, retaining vegetation, and mimicking natural hydrology to the maximum extent feasible.
- The proposal places the reserve drainfield for the proposed septic system on the property to the north, but no connection line would be located in the right-of-way. No construction would occur within the no-disturbance zone that was designated as a condition of the 2005 RUE. Should a reserve drainfield be needed at some point in the future, any associated development activities in the right-of-way would require review and approval by the City.
- There was some mention of a concrete wall being constructed close to the property boundary, but no wall appears to be proposed by the Applicant in his submittal documents.

*Exhibit 1, Staff Report, pages 25 and 26.*

#### Prehearing Briefs

23. Attorney James Haney submitted a legal memorandum on behalf of the City, dated September 1, 2022, which asserts that *Kinderace, LLC, v. City of Sammamish*, 194 Wn. App. 835, 379 P.3d 135 (2016) supports the City's position that the current RUE request should be denied because the Applicant's predecessor already derived a reasonable use of the subject property when it was used for mitigation to support development on the northern adjacent parcel as part of the 2005 RUE. The *Kinderace* decision is discussed further in the conclusions section of this decision below. *Exhibit 27.*
24. Attorneys Piper Thornburgh and Stephanie Marshall submitted a hearing brief on behalf of the Applicant, dated September 6, 2022, which asserts:
  - The Applicant meets all requirements for approval of a RUE under BIMC 16.20.080, but City staff recommends denial based on a decades-late attempted revision of a previous RUE for an adjacent parcel.
  - The City does not dispute that reasonable use of the property cannot be achieved through buffer modification and that there are no alternatives to development other than a RUE. Rather, the City asserts that the Applicant has somehow gained reasonable use of the property via the 2005 RUE, which applies only to the parcel to the north.
  - The record demonstrates that the previous development authorized under the 2005 RUE pertained solely to the northern lot, and there is nothing in the 2005 RUE

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*



- that puts an owner on notice that the southern lot can never be developed because it allegedly benefitted from the approved development of the separate north lot.
- The Applicant's reasonable, investment-based expectations were made, in large part, on the fact that the 2005 RUE did not restrict development on the subject property and did not require aggregation of the two separate lots. Denial of the RUE application would render the Appellant's lot undevelopable under the City's critical areas regulations, resulting in a taking of private property without just compensation.
  - The facts underlying the decision in *Kinderace* do not support the City's position here.

*Applicant's Hearing Brief.*

#### Testimony

25. City Associate Planner Annie Hillier testified generally about the application, the review process that occurred, and how City staff determined that the proposal would not meet certain RUE criteria based on an earlier RUE decision approving development on the adjacent northern parcel. She provided a description of the subject property and the proposed development, consistent with the findings above, stressing that the entire site is covered by critical areas and associates buffer and, therefore, a RUE would be required to allow for any development on the property. Ms. Hillier noted that mitigation plantings were installed on the subject property, and subsequently monitored, to address impacts from development on the adjacent to the north pursuant to an earlier RUE approval. She stated that City staff determined that, because of the previous development and mitigation under the previous RUE, a reasonable use of the subject property was already made and that, therefore, the current proposal cannot satisfy all necessary RUE criteria. Ms. Hillier explained that City staff's position that the current request does not meet the RUE criteria is based solely on the previous decision approving the 2005 RUE request. She noted that the septic transfer line to the proposed reserve drainfield on the northern adjacent parcel is proposed to be located through the Lytle Road NE right-of-way but explained that the City could not commit to allowing a private use of the public right-of-way at this time.

In response to questioning from Attorney Haney, Ms. Hillier noted that materials submitted with the 2005 RUE request and reviewed at the preapplication stage indicated that the proposal was to construct a single residence on both properties, with the residence originally proposed to be located on the southern parcel and later revised to be located on the northern parcel. She also noted that the decision approving the previous RUE request referred to both the northern and southern parcels. Ms. Hillier explained that her interpretation of the previous decision's reference to both parcels was that the previous proposal was for a joint development of both parcels. She also highlighted language in the previous RUE application and in other materials submitted with it that reference both the northern and southern parcels. Ms. Hillier acknowledged, however, that the staff report prepared for the previous 2005 RUE request referenced only the

northern adjacent property and not the southern property that is currently at issue with the current RUE request.

In response to questioning from Attorney Marshall, Ms. Hillier stated that she did not work for the City in 2005 when the earlier RUE request was reviewed and approved. She also explained that the critical areas on the properties were not regulated in the same way at the time the previous RUE request was reviewed and approved. Ms. Hillier noted that the term “joint development” was not used in any of the 2005 RUE application materials or decision approving the RUE application. She explained that the City preapplication letter is not a legally binding document. Ms. Hillier noted that she did not prepare the earlier draft staff report for the current RUE request, which did not take a definitive position on the 2005 RUE decision precluding the grant of a RUE for the southern subject property. *Testimony of Ms. Hillier.*

26. City Development Engineer Paul Nylund testified that, if the primary septic drainfield were to fail and the reserve drainfield on the adjacent property to the north would need to be utilized, a transport line through the Lytle Road NE right-of-way would be necessary because of the no-disturbance zone on the adjacent property. He explained, however, that use of the public right-of-way is generally reserved for public utilities and that the City could not guarantee that it would allow use of right-of-way for the private septic transport line should it become necessary. Mr. Nylund noted that he has recommended a condition addressing this issue should the Hearing Examiner decide to approve the RUE request.

In response to questioning by Attorney Marshall, Mr. Nylund testified that there is an existing sewer line located in the vicinity of the subject property and that sewer service could potentially be expanded to serve the site in the future, but he explained that there is no current availability for public sewer service expansion at this time. *Testimony of Mr. Nylund.*

27. Applicant Tom White testified that he purchased both the subject property and the adjacent northern property from the previous property owner in 2006. He explained that he analyzed the title report at the time, which indicated to him that both parcels were legal building lots. Mr. White provided a brief description of the proposed development, consistent with the findings above. He noted that he retained Wetland Biologist Joanne Bartlett, of Ecological Land Services, to analyze the critical areas on-site and to prepare a mitigation plan. Mr. White stated that the two lots immediately to the south of the subject property are of a size similar to the subject property and are developed with single-family residences. He described his experience working with several different members of City staff throughout the lengthy application process. Mr. White explained that it was his understanding that the City would adopt a neutral position on the current RUE application based on unclear information as to what occurred during the 2005 RUE application process, and he highlighted language in an earlier draft staff report supporting

his understanding. He stated that he examined the notices to title for both properties and that nothing within the notices indicated that the southern property was not a legally buildable lot. Mr. White explained that he built the house on the northern property, in which he currently resides, and acknowledged that plantings occurred on the southern subject property but stated that he was not aware about the nature of these plantings (i.e., whether they were required mitigation plantings) because he relied on Ms. Bartlett's expertise with regard to such matters. He stated his belief that there would have been adequate area on the northern property for any mitigation required for the 2005 RUE approval. Mr. White stressed that, unlike the mitigated areas on the northern parcel that are thriving, the southern parcel is essentially a field and would be ecologically restored with the current RUE request. He also stressed that the site plan referenced in the previous RUE decision, and included with the notices to title, depicts a no-disturbance zone only on the northern property and not the southern subject property. *Testimony of Mr. White.*

28. Wetland Biologist Joanne Bartlett testified that she worked with the previous property owner in relation to the earlier 2005 RUE request, was hired by the Applicant to conduct the required monitoring for the mitigation imposed with the previous RUE approval, and was again retained by the Applicant to prepare the critical areas analysis and mitigation plan for the current RUE proposal. Regarding the 2005 RUE, she explained that the wetland on the property was not regulated at the time, due to its size, and that the mitigation required for the 2005 RUE approval related only to impacts to the on-site stream buffer from the proposed development of the northern parcel. Ms. Bartlett noted that the native vegetation on the northern lot currently consists of shrubs and scattered conifer trees, as well as some grasses. She noted that native vegetation on the southern subject parcel currently consists of a couple of plants and small Douglas fir trees, as well as some volunteer wild cherry trees, but explained that the site is otherwise bare and composed of grasses. Ms. Bartlett stated that the current municipal code does not specifically require a one-to-one mitigation ratio but instead requires that mitigation achieve no net loss of ecological functions based on best available science. She stressed that the current mitigation plan would achieve this no net loss standard by improving buffer functions through the installation of diverse native plants. *Testimony of Ms. Bartlett.*
29. Astolfo Rueda, who was represented at the hearing by Attorney Joshua Lane, testified that he lives on property directly south of the subject property. He expressed concerns that the on-site wetland is larger than that delineated in the critical areas report. Mr. Rueda stated that his property has experienced significant flooding from water flowing through the Applicant's property. He noted that he has repeatedly asked the Applicant to maintain the creek to address these flooding issues but that the Applicant has responded that he could not do so because the wetland is a delicate ecosystem requiring protection. Mr. Rueda explained that he has incurred significant expenses to address the flooding to no avail and that his foundation has experienced cracking due to the excessive water

entering his property. He raised concerns that the current development proposal would exacerbate these flooding issues. *Testimony of Mr. Rueda.*

30. Cheryl Laughbon testified that she and her husband live near the on-site wetland and that they have witnessed wildlife returning to the area restored through the previous mitigation required by the 2005 RUE. She stated, however, that the area is missing vegetation necessary to accommodate the return of other wildlife that historically used the site, which may have been caused by improper mowing of the site. Ms. Laughbon expressed concerns that the current proposal would have adverse impacts on wildlife habitat. *Testimony of Ms. Laughbon.*
31. Rod Stevens testified that the Applicant's predecessor already obtained a reasonable use of the property with the prior RUE approval, which should preclude the granting of a RUE in this matter. He stated that the materials included with the previous RUE request should have put the Applicant on notice that the subject property was not a buildable lot when he purchased it together with the adjacent property to the north. Mr. Stevens raised concerns that, if the RUE were approved, the Applicant would not fully comply with the imposed conditions. *Testimony of Mr. Stevens.*
32. Chris Laughbon testified that he has lived in the area since 2002 and is familiar with the property. He raised concerns about past activities taking place on the northern property from the previous property owner that had a detrimental effect on wetlands. Mr. Laughbon stated that mitigation took place on the southern parcel for the 2005 RUE because there was insufficient space on the northern parcel to mitigate for impacts from development on the northern parcel. He further stated that the mitigation on the southern parcel has not thrived, likely due to improper mowing of the parcel by the Applicant. Mr. Laughbon also raised concerns that the proposed residence would adversely impact wildlife habitat, and he took issue with the determination by Ms. Bartlett that the proposed mitigation would achieve no net loss of ecological functions because her analysis did not account for any overlapping mitigation required by the previous RUE approval. *Testimony of Mr. Laughbon.*
33. Rebecca Blake testified that the Applicant should have the right to build on the property because it was a legally created lot that he had purchased. She noted that the proposed design appears to be well thought out and that she supports strong mitigation measures to ensure that the development would not result in unreasonable impacts to the environment. Ms. Blake suggested that members of the public wishing to prevent development of the property should purchase it. *Testimony of Ms. Blake.*
34. John Zimmatore echoed Ms. Blake's testimony in support of the proposal, noting that the subject property and adjacent northern property were not required to be aggregated as part of the prior RUE approval. He stated that issues with flooding to neighboring properties could be caused by the existing conditions of those properties rather than

activities taking place on the subject property. Mr. Zimmatore noted that the previous mitigation required by the prior RUE approval appears to be successful based on observations that wildlife has returned to the site, which should alleviate concerns that the Applicant would not follow through on any required mitigation should the current RUE request be approved. He also noted that the proposal would provide needed housing in the area. *Testimony of Mr. Zimmatore.*

35. James Stoner expressed general support for the proposal, noting that it would provide additional needed housing in the area. *Testimony of Mr. Stoner.*
36. Pamela Carpenter also expressed support for the request, noting that the Applicant should be allowed to build on a legally created lot that he purchased. She also noted that the proposal would provide needed housing and that the Applicant would be required to comply with conditions requiring mitigation for the project's impacts to critical areas buffers. *Testimony of Ms. Carpenter.*
37. Greg Spils raised concerns about the impacts to critical areas from construction of a single-family residence on a small, 0.2-acre property that is entirely covered by an on-site stream, a wetland, and their associated buffers. *Testimony of Mr. Spils.*
38. Following testimony from members of the public, Ms. Bartlett provided additional testimony about the proposal. She explained that there was likely mitigation planting that occurred on the southern subject parcel associated with the prior RUE approval but could not recall the extent of mitigation plantings that occurred on the subject parcel. Ms. Bartlett stated that there would likely have been sufficient area on the northern parcel to provide migration at a one-to-one ratio, which was the standard at the time, for impacts to the stream from the development proposed with the 2005 RUE request, noting that only a 25-foot stream buffer was required at that time. She stated that she was surprised by the City's current assertion that mitigation on the south subject property was required for impacts from development on the north lot. Ms. Bartlett explained that the stream appears to be functioning well but that the proposed mitigation would improve the functions of the stream and wetland buffers by providing native trees and shrubs that are currently lacking. She stated that, although she could not specifically recall the extent of the mitigation plantings that took place on the subject property as part of the 2005 RUE, she stressed that she did not design the current mitigation plan to rely on previous mitigation plantings.

In response to questioning from Attorney Haney, Ms. Bartlett acknowledged that her previous wetland analysis report and buffer enhancement plan, dated October 7, 2004, addressed both the southern parcel and northern parcel. She explained that she prepared an addendum to the October 7, 2004, report and mitigation plan on March 1, 2005, after the Applicant revised the project plans to relocate the proposed development to entirely within the northern parcel. Ms. Bartlett acknowledged that her 2005 addendum stated

that the revised mitigation plan proposes the same enhancement but that the planted area would now be in “the southern rather than the northern half of the stream” but she could not recall what was intended by that language. Moreover, she could not definitively explain whether this new planted area would occur on the southern parcel but acknowledged that her addendum referenced both lots. Ms. Bartlett also acknowledged that the planting plan for the 2005 RUE appeared to show proposed mitigation plantings on the southern lot.

On redirect from Attorney Marshall, Ms. Bartlett stated that she could not remember if she distinguished between the two separate parcels when designing and implementing the 2005 mitigation plan. *Testimony of Ms. Bartlett.*

#### Additional Materials

39. Following the hearing, the Hearing Examiner left the record open until September 23, 2022, to allow for the submission of closing briefs from the attorneys representing the City and the Applicant. *Oral ruling of the Hearing Examiner.*
40. Attorneys Thornburgh and Marshall submitted a closing brief on behalf of the Applicant, dated September 23, 2022, which asserts:
- The *Kinderace* decision does not apply because the facts are distinguishable based on the 2005 RUE not being for a “joint development proposal.” Unlike in *Kinderace*, here the City has not presented any evidence showing the development was made possible by the ability to include mitigation on the south parcel; also, the Applicant did not manipulate lot lines and parcel sizes through a boundary line adjustment to gain additional development rights, the Applicant purchased the properties in an arms-length transaction, and the City did not require any notice of potentially constrained development rights to be recorded against the south parcel.
  - Any takings claim in response to the City’s statement that a grant of a RUE would not guarantee a future transport line to the reserve drain field is premature and unwarranted. Although current standards do not provide for use of the right-of-way for private utilities, standards might change, or the use might be allowed after due consideration. That issue is not before the Hearing Examiner in this matter, and the Hearing Examiner lacks jurisdiction to address constitutional issues.
  - The City’s assertion that the 2005 RUE applied to both parcels is an illegal collateral attack because the City cannot now change the terms and broaden the scope of the 2005 RUE to include both parcels.
- Applicant’s Closing Argument, dated September 23, 2022.*
41. The Applicant submitted a declaration, dated September 23, 2022, correcting his testimony to clarify that he commenced mitigation plantings for the 2005 RUE and began construction of the residence on the northern property in 2006, rather than 2007. Ms.

Bartlett also submitted a declaration, dated September 23, 2022, in response to a public comment received by the City on September 20, 2022. The public comment provided a general timeline of events associated with the mitigation plantings and monitoring for the 2005 RUE. Ms. Bartlett's declaration noted that, contrary to one of the assertions in the public comment, mitigation plantings did not occur "completely across the southern parcel" and, rather, the planting plan was designed to place plants within the then-applicable 25-foot stream buffer, with extra plantings placed on the west side of the stream within the buffer. *Declaration of Applicant Correcting Testimony from Hearing, dated September 23, 2022; Declaration of Joanne Bartlett in Response to Submission of Comment on September 22, 2022, dated September 23, 2022.*

42. The City submitted a closing brief, dated September 23, 2022, which reiterated its position that the previous 2005 RUE involved a joint development of both the southern subject parcel and the adjacent northern property and, therefore, as supported by the *Kinderace* decision, the current RUE application does not meet the requirements for a RUE because the Applicant's predecessor already obtained a reasonable use of the subject property. *City of Bainbridge Island's Closing Argument, dated September 23, 2022.*

#### Staff Recommendation

43. City staff recommends denial of the application but has provided recommended conditions should the Hearing Examiner decide to approve the RUE and variance requests. *Exhibit 1, Staff Report, pages 23, 24, and 27 through 30.*

### **CONCLUSIONS**

#### Jurisdiction

The Hearing Examiner has authority to hear and approve, approve with conditions, deny, or remand a request for a reasonable use exception. *BIMC 2.14.030; BIMC 2.16.100; BIMC 16.20.080.E*. The Hearing Examiner also has authority to hear and approve, approve with conditions, or deny a request for a minor variance under the City's consolidated project review process. *BIMC 2.16.060; BIMC 2.16.170.*

#### Criteria for Review

##### *Reasonable Use Exception*

Criteria for review and approval of reasonable use exceptions are as follows:

1. The application of this chapter would deny all reasonable use of the property;
2. There is no reasonable alternative to the proposal with less impact to the critical area or its required buffer;
3. The proposal minimizes the impact on critical areas in accordance with mitigation sequencing (*BIMC 16.20.030*);

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*

4. The proposed impact to the critical area is the minimum necessary to allow reasonable use of the property;
5. The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant, or of the applicant's predecessor, that occurred after February 20, 1992;
6. The proposed total lot coverage does not exceed 1,200 square feet for residential development;
7. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property;
8. Any alterations permitted to the critical area are mitigated in accordance with mitigation requirements applicable to the critical area altered;
9. The proposal protects the critical area functions and values consistent with the best available science and results in no net loss of critical area functions and values;
10. The proposal addresses cumulative impacts of the action; and
11. The proposal is consistent with other applicable regulations and standards.

*BIMC 16.20.080.F.*

#### *Minor Variance*

Criteria for review and approval of a minor variance are as follows:

1. A minor variance may be approved or approved with conditions if:
  - a. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is located; and
  - b. The variance is requested because of special circumstances related to the size, shape, topography, trees, groundcover, location or surroundings of the subject property, or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access; and
  - c. The need for a variance has not arisen from previous actions taken or proposed by the applicant; and
  - d. The variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and zone, but that is denied to the property in question because of special circumstances on the property in question, and will not constitute a grant of special privilege inconsistent with the limitations upon uses of other properties in the vicinity in which the property is located; and
  - e. The variance is consistent with all other provisions of this code, except those provisions that are subject to the variance, and is in accord with the comprehensive plan.

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*



2. A variance may be approved with conditions. If no reasonable conditions can be imposed that ensure the application meets the decision criteria [described above], then the application shall be denied.

*BIMC 2.16.060.D*

The criteria for review adopted by the City of Bainbridge Island City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

1. **With conditions, the proposal would comply with the reasonable use exception criteria of BIMC 16.20.080.F.** The 0.2-acre subject property is a legal lot of record within the City's R-2 zoning district and contains a Type Ns stream and Category II wetland with protective buffers that extend over the entirety of the property. Under these circumstances, strict application of the City's critical areas ordinances would typically deny all reasonable use of the property. The Hearing Examiner must determine at the outset, however, whether the Applicant already derived a reasonable use of the subject property based on the City's previous approval of a 2005 RUE request that authorized development on an adjacent 0.66-acre property to the north. The City relies on *Kinderace, LLC, v. City of Sammamish*, 194 Wn. App. 835, 379 P.3d 135 (2016), to support its position that the Applicant already derived a reasonable use of the property precluding the grant of a second RUE. The Hearing Examiner determines that the facts underlying the *Kinderace* decision are distinguishable from those present in this matter and that previous 2005 RUE approval does not preclude approval of the Applicant's current RUE request.

The *Kinderace* case involved the phased commercial development of four adjacent parcels (Parcels 9032, 9058, 9053, and 9039). Phase 1 of the project included development of a "Plateau Professional Center," which consisted of a Starbucks and a medical office building on Parcel 9039. Phase 2 included the joint development of Parcels 9058 and 9032, with a fast-food restaurant and daycare facility located on Parcel 9058 and an associated stormwater detention pond located on Parcel 9032. At the time of the proposed development, Parcel 9032 was bifurcated by George Davis Creek, which had a required 150-foot stream buffer. Notably, the detention pond "located north of the creek on Parcel 9032 was critical to allowing Parcel 9058 to be developed as extensively as proposed in Phase 2." *Kinderace*, 194 Wn. App. at 838. As part of the proposal, the project proponent requested a variance from the strict application of a 150-foot wetland buffer requirement, and the City of Sammamish approved the development permit and variance for the three parcels on July 9, 2004. The Sammamish City Council later adopted an ordinance that increased buffer requirements, which resulted in the southern

portion of 9032 being designated as a buffer area restricted from development without approval of a buffer modification or RUE. Parcel 9058 was later sold in 2006 for \$3,815,000, with records showing that the “development and substantial sale price were made possible by the ability to locate the storm water detention pond on Parcel 9032.” *Kinderace*, 194 Wn. App. at 839.

The project proponent, SR Development, subsequently met with City of Sammamish officials to discuss the possibility of developing the remainder of Parcel 9032 as a parking lot, and City of Sammamish expressed that the parcel would not qualify for a RUE because it was already being used as a stormwater detention facility. The proponent later obtained a boundary line adjustment that resulted in the stormwater detention pond being located on Parcel 9058, and “[b]y design, new Parcel 9032 [was] completely constrained by stream, wetlands, and buffers.” *Kinderace*, 194 Wn. App. at 840. The boundary line adjustment notices “contained an ‘Approval Note’ which stated that ‘This Request Qualifies for Exemption under SMC 19.20.010. It Does Not Guarantee the Lots Will be Suitable for Development Now or in the Future.’” *Kinderace*, 194 Wn. App. at 840. The property owner later conveyed Parcel 9032 to Kinderace, LLC, after successfully appealing the assessed value of the parcel in a manner reducing its value from \$198,600 to \$50,000. Kinderace then requested a RUE to allow commercial development of Parcel 9032, which the City of Sammamish denied based on its determination that the property already obtained a reasonable use because it “‘ha[d] already been extensively developed with multiple commercial uses’ by SR Development ‘a corporate ego’ of Kinderace.” *Kinderace*, 194 Wn. App. at 841. The City of Sammamish Hearing Examiner denied Kinderace’s appeal of the City of Sammamish’s decision denying the RUE request, and Kinderace filed a Land Use Petition Act (LUPA) action in the superior court. The superior court granted the City of Sammamish’s motion for summary judgment, “finding that Kinderace had achieved reasonable beneficial use of Parcel 9032, in both the old and new configurations, as part of the joint development with Parcel 9058,” and Kinderace appealed to the Court of Appeals. *Kinderace*, 194 Wn. App. at 842.

The Court of Appeals denied Kinderace’s appeal, reasoning in relevant part:

In determining whether Kinderace had derived an economic use of new Parcel 9032, the trial court properly considered the configuration of the parcel at the time the regulations were enacted. To hold otherwise would enable a property owner to subvert the environmental regulations by changing parcel boundaries to consolidate critical areas. Once an owner had delineated a parcel that was entirely constrained, he or she could claim deprivation of all economically viable use. Here, SR Development instituted the boundary line adjustment, specifically carving out the parts of old Parcel 9032 to contain only the environmentally critical areas, and conveyed the property to Severson's new entity, Kinderace. The area of

new Parcel 9032 had already been developed as part of the joint development of Plateau Professional Center. We reject the argument that Kinderace can use a boundary line adjustment to isolate the portion of its already-developed property that is entirely constrained by critical areas and buffers, and then claim that the regulations have deprived that portion of all economically viable use.

*Kinderace*, 194 Wn. App. at 844-55.

In the present case, the facts underlying the City's previous approval of the 2005 RUE request are distinguishable from those in *Kinderace*. First, unlike in *Kinderace*, the record here does not firmly establish that the previous RUE request involved a "joint development" of both the southern 0.2-acre property and 0.66-acre northern property. Although the previous 2005 RUE request clearly began as a proposal to jointly develop both lots, with the proposed residence to be located on the southern lot and infrastructure necessary to support the residence to be located on the northern lot, these plans changed, following recommendations by the Wetland Advisory Committee, to relocate all proposed development on the northern lot with no construction proposed on the southern lot. The Hearing Examiner notes in this regard that project plans may change during the iterative permit review process, as acknowledged in Ms. Hillier's hearing testimony. Second, unlike in *Kinderace*, it is not entirely clear that mitigation on the southern lot was necessary to allow the development on the northern lot. Although Ms. Bartlett's critical areas analysis and 2005 buffer mitigation plan, as amended following the site plan revision to locate the residence on the northern lot, indicates that mitigation plantings seemingly would occur on the southern lot, it does not clearly indicate that these plantings were necessary to mitigate impacts from development of the northern lot, and Ms. Bartlett suggested at the hearing that there would likely have been sufficient area on the northern parcel to support the required mitigation. Third, unlike in *Kinderace*, the City's decision approving the 2005 RUE request does not clearly indicate that the granting of the RUE would result in the southern property becoming an unbuildable lot. Although the decision clearly refers to both the northern and southern lots, it did not require a consolidation of the lots as a condition of RUE approval and did not require the southern lot to be designated within the "no-disturbance/restoration zone." Instead, the site plan approved with the previous RUE decision, and recorded against the title, shows the southern lot but depicts only the southern portion of the northern lot as within the "no-disturbance/restoration zone." In short, had the City intended to restrict all future development of the southern lot as it asserts here, it could have made this intention clear by requiring a consolidation of the lots or by designating the subject property as within the "no-disturbance/restoration zone," but it did not do so. Finally, unlike in *Kinderace*, neither the Applicant nor his predecessor obtained a boundary line adjustment designed to constrain the property with critical areas necessitating the need for a RUE. Having determined that the previous RUE does not preclude approval of the Applicant's current

RUE request, this decision turns to whether the remaining applicable RUE criteria are satisfied.

The City provided reasonable notice and opportunity to comment on the application and to testify at the open record hearing. The City received numerous comments on the proposal from members of the public, and several members of the public testified at the hearing, both in favor and in opposition to the RUE request. Members of the public opposing the RUE request generally raised concerns about flooding issues, development within the no-disturbance zone on the adjacent property to the north, and impacts to wildlife habitat, water quality, and the existing character of the neighborhood. Regarding existing flooding issues to neighboring properties, City staff indicates that these flooding issues are due to historical and existing hydrological conditions and due to a lack of stormwater management facilities along Lytle Road NE. The City Development Engineer reviewed the proposal and determined that it would be consistent with application stormwater regulations, and the Applicant would be required to submit and obtain approval of a final stormwater site plan demonstrating compliance with the City's applicable stormwater requirements. The Applicant's project plans do not include any development within the no-disturbance zone designated on the adjacent northern property. Although the current plans identify a septic reserve drainfield on the northern lot, review of the location for a septic transport line connecting the on-site septic system to the reserve drainfield would occur when, and if, the reserve drainfield becomes necessary.

The Applicant proposes construction of a single-family residence that would have a total building footprint of 868 square feet when accounting for deck areas and cantilevered portions of the residential structure, with associated improvements that would include a pervious pavement driveway and on-site septic system. To minimize impacts to the critical areas and associated buffers, the residence, driveway, and primary septic drainfield would be sited in the eastern portion of the property as far as feasible from the on-site stream. As proposed, the single-family residence, driveway, and primary septic drainfield would be located entirely within the 75-foot buffer associated with the Category II wetland, and a portion of the residence and driveway would be located within the 50-foot buffer associated with the Type Ns stream. Because these critical areas and associated buffers cover the entire property, there is no reasonable alternative to the proposed location of the residence and associated infrastructure that would have less impact on the critical areas or their required buffers.

As mitigation for the approximately 2,695 square feet of wetland and stream buffer that would be permanently impacted by the proposed development, the Applicant proposes to enhance 157 feet of the on-site wetland and 3,349 square feet of wetland and stream buffer areas through the planting of native trees and shrubs. The Applicant also proposes to preserve 2,661 square feet of high-functioning vegetated buffer areas located to the

west of the on-site stream and wetland and to install stainless steel cable fencing along the edge of the designated buffer area to limit human intrusion while still allowing for wildlife passage. Ms. Bartlett's 2021 Wetland Report and mitigation plan determined that this proposed mitigation would provide a functional lift for the critical areas and remaining buffer areas and that the project would result in no net loss of ecological functions. It is, however, unclear from the critical areas report and Ms. Bartlett's hearing testimony whether the proposed mitigation for this project would overlap with mitigation that was required for the previous 2005 RUE approval. Accordingly, the Hearing Examiner determines that it would be appropriate to condition approval of the RUE request to require the Applicant to submit a final mitigation plan demonstrating, to the satisfaction of the City—following third party review by a different wetland biologist selected by the City—that the mitigation would result in no net loss of critical function and value without relying on any previous mitigation planting areas utilized in relation to the previous RUE approval and that development of a portion of the northern property for the potential reserve septic drainfield is appropriately accounted for in analyzing environmental impacts to both properties cumulatively, and each individually.

The Hearing Examiner has also determined that the Health District must verify that the proposal can be developed prior to resolution of the issue related to the septic transport line and the city's right-of-way. No development shall occur prior to the Health District acknowledging that the single-family residence can be constructed without the immediate benefit of a reserve septic drainfield or, alternatively, resolution of this issue with the City otherwise occurs.

City staff reviewed the proposal and determined that it is categorically exempt from SEPA review. City staff also determined that the proposal would be consistent with the goals and policies of the Comprehensive Plan, including the Land Use Element, the Environmental Element, and the Water Resource Element. As noted above, the 0.2-acre property is located within the R-2 zoning district, in which single-family dwellings are a permitted use. The property is legally nonconforming with the minimum lot area and lot width requirements currently applicable to properties in the R-2 zoning district. With approval of the request for a variance from front setback requirements, addressed in Conclusion 2 below, as necessary to minimize impacts to the on-site critical areas, the proposal would comply with applicable development regulations for the R-2 zone, including requirements related to building setbacks, off-street parking, and lot coverage. The proposal would also comply with the more restrictive lot coverage requirement for a RUE, which limit lot coverage to 1,200 square feet. Approval of the RUE would permit the Applicant to develop a single-family residence and associated improvements on the property consistent with other residences in the vicinity and in the R-2 zoning district. The Hearing Examiner determines that the proposal, as conditioned, would not pose an unreasonable threat to the public health, safety, or welfare on or off the property.

Conditions, as detailed below, are necessary to ensure that the proposal's impacts to critical areas are the minimum necessary to allow reasonable use of the property, to ensure that the proposal satisfies all other criteria for approval of a reasonable use exception, and to ensure that the proposal complies with all other applicable local, state, and federal requirements. *Findings 1 – 43.*

2. **With conditions, the proposal would comply with the minor variance criteria of BIMC 2.16.060.D.** The Applicant requests a variance to allow a reduction of the required front setback from 25 feet to 20 feet, which is necessary to allow the proposed residence to be sited in an area on the property that would result in the least impact on the on-site critical areas. The need for a variance is not the result of any actions taken or proposed by the Applicant but is, instead, due to the special circumstances of a Type Ns stream, a Category II wetland, and their associated buffers impacting the entire property. Granting the variance would allow the Applicant to construct a single-family residence on the property, consistent with the right enjoyed by other owners of property in the vicinity and R-2 zone, while minimizing impacts to the on-site critical areas, and thereby satisfying the requirements for approval of a RUE. The proposal would comply with all other applicable development regulations and would be consistent with the Comprehensive Plan. Conditions, as detailed below, are necessary to ensure that the proposal satisfies the criteria for a variance, as well as all other applicable local, state, and federal requirements. *Findings 1, 4 – 43.*

### **DECISION**

Based upon the preceding findings and conclusions, the request for a reasonable use exception, to allow for the development of a single-family residence and associated improvements on an undeveloped 0.2-acre lot that is entirely impacted by a Category II wetland, a Type Ns Stream, and their associated buffers, located at 3935 Lytle Road NE, and for a zoning variance to reduce the required front setback from 25 feet to 20 feet, to allow the proposed residence to be sited closer to Lytle Road NE and further from the on-site critical areas is **APPROVED**, with the following conditions:<sup>2</sup>

1. Work shall be completed in substantial compliance with the design and specifications included in the current RUE file, including:
  - a. Total building footprint, including decks, not to exceed 868 square feet (proposed);
  - b. A permeable driveway;
  - c. A permanent impact area not to exceed 2,695 square feet;
  - d. Development and permanent impacts located outside of all wetlands.

---

<sup>2</sup> This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.

2. Minor changes to the site plan within the approved impact area may be authorized as a part of the building permit review, provided the square footages of structures and impacts in Condition 1 do not increase.
3. Lot coverage calculations must be provided with the building permit application.
4. To further minimize impacts to the wetland buffer, the following shall be implemented:
  - a. No pesticides, herbicides, or fertilizers may be used in fish and wildlife conservation areas or their buffers except those approved by the U.S. Environmental Protection Agency (EPA) and Washington Department of Ecology and applied by a licensed applicator in accordance with the safe application practices on the label. This shall be stated on the site plan and recorded with the Notice to Title.
  - b. Lighting on the exterior of the residence to shall be limited to the minimum necessary and shall be directed downward and away from the wetland.
  - c. Access of machinery shall be restricted to as few areas as possible, to reduce soil compaction. These areas shall be indicated on the site plan with the building permit application.
  - d. Construction shall take place during the dry season (May through September) to reduce impacts to aquatic resources.
  - e. Tall, dense evergreen vegetation shall be planted around the outside edge of the buffer to improve screening between development and the wetland.
  - f. The buffer enhancement area shall not be cleared or grubbed, except for the removal of invasive species. Downed woody debris shall be retained, and plant material from invasive species removal shall be removed and properly disposed of.
  - g. No refuse, including but not limited to household trash, yard waste (e.g., lawn clippings) and commercial/industrial refuse, shall be placed in the buffer.
  - h. As the largest impervious surface proposed for installation on the subject site, roofing deserves particular attention. The City recommends conditioning one or a combination of the following:
    - i. Roofing shall be of a non-leaching material that is not harmful to the environment. Examples of non-leaching materials are metal and tile roofs. Any alternative method proposed requires approval by the City prior to final building permit issuance, and must address BIMC water quality standards, Chapter 13.24 BIMC, to assure that wetland flora and fauna functions and values are maintained/enhanced.
    - ii. The roof of the single-family residence shall be a permeable green roof of an appropriate design to further slow the flow of stormwater, and to enhance ecological function on the subject site following construction. Any alternative method proposed requires approval by the City prior to final building permit issuance, and must address BIMC water quality

standards, Chapter 13.24 BIMC, to assure that wetland flora and fauna functions and values are maintained/enhanced.

- i. Maintenance of all permeable hard surfaces – namely the driveway and green roof – at appropriate intervals shall be required to ensure that they retain their functionality for stormwater management. A permeable hard surfaces maintenance plan should be included as a part of the final building permit application. Updates regarding the condition and function of permeable surfaces and confirming appropriate maintenance has taken place are required to be included in any annual monitoring reports submitted to the City.
- j. To prevent inadvertent damage to significant trees, the site plan shall identify significant trees. Tree root protection fencing is required for any significant trees with roots in the immediate vicinity of the project area. Tree root protection fencing shall be marked on the final site plan and in place prior to the start of construction.

A final mitigation plan shall be provided with the building permit application, in accordance with BIMC 16.20.180.G.3.b. The final mitigation plan must address the effects of a cantilevered house design, as well as the issue of using the same mitigation area as the 2005 RUE and the cumulative impact of this second residential use. The final mitigation plan must demonstrate to the satisfaction of the City—following third party review by a different wetland biologist selected by the City, the cost of which shall be borne by the Applicant—that the mitigation would result in no net loss of critical function and value without relying on any previous mitigation planting areas utilized in relation to the previous RUE approval and that development of a portion of the northern property for the potential reserve septic drainfield is appropriately accounted for in analyzing environmental impacts to both properties cumulatively, and each individually.

5. A final planting plan shall be submitted with the building permit application, consistent with the results of the updated mitigation plan.
6. A temporary five-foot high chain link fence with tubular steel poles or “T” posts shall delineate the area of prohibited disturbance, which is the outer edge of the reduced wetland buffer surrounding the residence and drainfield, unless the Director has approved the use of a four-foot-high plastic net fence as an alternative. The fence shall be indicated on the site plan. The fence shall be erected and inspected by City staff before clearing, grading, and/or construction permits are issued and shall remain in place until construction has been completed and shall at all times have affixed to it a sign indicating the protected area.
7. Prior to final inspection of the building permit, the temporary fencing shall be replaced with the permanent split-rail fence or stainless-steel cable fence (as proposed by the Applicant) along the perimeter of the buffer enhancement area.

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*



8. A minimum of two signs indicating the presence of a protected wetland buffer shall be placed on the split-rail fence, prior to final inspection of the building permit. Signs shall be made of metal or a similar durable material and shall be between 64 and 144 square inches in size. The Director may notify the Applicant that additional signs are required, should they be deemed necessary as a result of the final building area layout.
9. All plantings shall be installed prior to final building permit inspection, or a performance surety shall be provided in accordance BIMC 16.20.160.
10. A monitoring report shall be submitted annually by December 31st each year, at a minimum, documenting milestones, successes, problems, and contingency actions of the mitigation plan. The mitigation plan shall be monitored for a period necessary to establish that performance standards have been met, but not for a period less than seven years.
11. If the performance standards in the mitigation plan are not met, a contingency plan shall be submitted to the Department of Planning and Community Development for approval. Any additional permits or approvals necessary for contingency actions shall be obtained prior to implementing the contingency plan.
12. A maintenance surety shall be provided prior to final building permit inspection, or upon release of the performance surety if plantings are not installed at the time of the final inspection, whichever is applicable. The Director shall release the maintenance surety upon determining that performance standards established for evaluating the effectiveness and success of the structures, improvements, and/or compensatory mitigation have been satisfactorily met for the required period.
13. The Applicant shall record a notice to title to document the presence of the wetland buffers and mitigation areas with the Kitsap County Auditor. Such notice shall provide notice in the public record of the presence of a critical areas, the application of Chapter 16.20 BIMC to the property, and that limitations on actions in or affecting such areas may exist. The notice must be recorded prior to the issuance of the building permit.
14. The Applicant shall comply with the following conditions to the satisfaction of the City engineer:
  - a. All underground utilities (domestic water, septic transport, power, telecom, etc.) shall be located/routed to minimize site disturbances to the maximum extent feasible.
  - b. Use of soil sterilant to construct the driveway shall be strictly prohibited.
  - c. Areas outside the building footprint, driveway, septic components, and associated drainfield and any necessary construction setbacks shall be protected from soil

- stripping, stockpiling, and compaction by construction equipment through installation of resilient, high visibility clearing limits fencing or equivalent, subject to inspection by the City prior to clearing and construction.
- d. Hardscaping shall be constructed of permeable materials or contain wide permeable jointing where feasible to allow infiltration or shallow subsurface filtration of surface stormwater. Building permit documentation shall include location and materials for proposed hard surface/hardscape and plans shall include construction details for permeable surfaces and subgrades.
  - e. Consideration shall be given to utilizing minimal excavation foundation systems per the 2012 Low Impact Development Guidance Manual for Puget Sound as a means of minimizing impacts to the proposed home site and the adjacent critical areas and buffers. A bid comparison/analysis shall be submitted demonstrating the Applicant has engaged an appropriate design and construction professional to explore alternative foundation systems including stilts, helical piers, and pin piles with grade beams. The bid(s) shall be obtained from a designer or installer with documented experience building with minimal excavation technology and submitted with the building permit for City engineering review prior to building permit review, approval, and issuance.
  - f. A final stormwater site plan/report shall be submitted with the building permit demonstrating compliance with all applicable minimum requirements as required by Chapter 15.20 BIMC.
  - g. In conjunction with compliance with Chapters 15.20 and 15.21 BIMC, selected Best Management Practices (BMPs) employing dispersion from the proposed structure and driveway shall give strong priority to diffuse flow methods (i.e., BMP C206: Level Spreader, pop-up emitters, diffuser tee or engineered equivalent) to minimize point discharges of surface stormwater into or toward the critical areas on site.
  - h. Placement of any rain garden, infiltration system (to include permeable driveway), and/or downspout dispersion systems shall comply with the Kitsap County Health Ordinance No. 2008A-01 for setbacks from wells, primary septic fields and reserve areas, and septic system components. (See Table 1B of the stormwater ordinance.).
  - i. Septic system components located within drivable surfaces shall comply with Kitsap Public Health District standards and requirements for traffic rated components.
  - j. In the event that the reserve septic drainfield becomes necessary, the Applicant must explore alternatives to locating the septic transport line in the Right of Way (ROW). Concurrence from the City's Public Works Department shall be required prior to installation within the ROW. The use of ROW for private utilities is a deviation from current standards that would be considered but is not generally approved, and future approval of such an alignment is in no way guaranteed by this decision.

15. The Health District must verify that the proposal can be developed prior to resolution of the issue related to the septic transport line and the city's right-of-way. No development shall occur prior to the Health District acknowledging that the single-family residence can be constructed *without the immediate benefit of a reserve septic drainfield* or, alternatively, resolution of this issue with the City otherwise occurs.
16. The RUE permit automatically expires and is void if the Applicant fails to file for a building permit or other necessary development permit within three (3) years of the effective date of the permit unless the Applicant has received from the City an extension for the permit.

**DECIDED** this 11<sup>th</sup> day of October 2022.



---

ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center

## Attachment A

The following exhibits were admitted into the record:

The following exhibits were compiled by the City and were admitted into the record:

1. Staff Report, dated September 2, 2022
2. Preapplication Summary Letter, dated August 6, 2019
3. Master Land Use Application, dated March 3, 2021
4. Notice of Incomplete Application Letter, dated April 5, 2021; Email from City Planner Annie Hillier to Tom White, dated April 26, 2021
5. Notice of Complete Application Letter, dated May 17, 2021
6. Notice of Application/Hearing, dated May 28, 2021
7. Declaration of Reserve Drain Field Easement, dated November 5, 2021
8. Notice of Public Hearing:
  - a. Notice of Public Hearing
  - b. Revised Notice of Public Hearing
9. Public Comments submitted on or before June 18, 2021:
  - a. Comment from Manda Bair, dated June 7, 2021
  - b. Comment from Jamie Berg, dated June 18, 2021
  - c. Comment from David Berg, dated June 18, 2021
  - d. Comment from Lissa Beytebiere, dated June 14, 2021
  - e. Comment from Steve Borgstrom, dated June 18, 2021
  - f. Comment from Robert Bosserman, dated June 18, 2021
  - g. Comment from Holly Brewer, dated June 12, 2021
  - h. Comment from Holly Brewer, dated June 15, 2021
  - i. Comment from Holly Brewer, dated June 17, 2021
  - j. Comment from Anne Browne, dated June 15, 2021
  - k. Comment from Nora Carlson, dated June 14, 2021
  - l. Comment from Pam Churchill, dated June 14, 2021
  - m. Comment from Kori Clot, dated June 12, 2021
  - n. Comment from Emily Crandall, dated June 17, 2021
  - o. Comment from Bonny Danielson, dated June 14, 2021
  - p. Comment from Lily Diament-Hansen, dated June 15, 2021
  - q. Comment from Robert Drury, dated June 13, 2021
  - r. Comment from Roberta Dueno, dated June 18, 2021
  - s. Comment from Doug Forsyth, dated May 31, 2021
  - t. Comment from Kitty Grant, dated June 15, 2021
  - u. Comment from Lesley Higgins, dated June 15, 2021
  - v. Comment from David Hooyer, dated June 17, 2021
  - w. Comment from Tom Jinks, dated June 11, 2021
  - x. Comment from Vicki Johnson, dated June 15, 2021
  - y. Comment from Judy Katilus, dated June 18, 2021

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*

- z. Comment from Dane Keehn, dated June 15, 2021
- aa. Comment from Kathryn Keve, dated June 14, 2021
- bb. Comment from Peter King, dated June 15, 2021
- cc. Comment from Attorney Joshua Lane on behalf of Astolfo Rueda, dated June 18, 2021, with attached memorandum from Core Design, Inc., dated June 18, 2021
- dd. Comment from Heidi Langendorff, dated June 16, 2021
- ee. Comment from Chris Laughbon, dated June 15, 2021
- ff. Comment from Cheryl Laughbon, dated June 18, 2021
- gg. Comment from Emily Magnotto, dated June 13, 2021
- hh. Comment from Matthew Malouf, dated June 17, 2021
- ii. Comment from Roberta Nelson, dated June 14, 2021
- jj. Comment from Crosby Olsen, dated June 17, 2021
- kk. Comment from Jane Pearson, dated June 18, 2021
- ll. Comment from Janelle Perreira, dated June 15, 2021
- mm. Comment from Beth Balas, dated June 17, 2021
- nn. Comment from Scott Roth, dated June 16, 2021
- oo. Comment from Charlotte Rovelstad, dated June 18, 2021
- pp. Comment from Janet See and Bill Reddy, dated June 16, 2021
- qq. Comment from Linda Shadwell, dated June 16, 2021
- rr. Comment from Erika Shriner, dated June 18, 2021
- ss. Comment from Mark Shriver, dated June 13, 2021
- tt. Comment from Greg Spils, dated June 18, 2021
- uu. Comment from Sharon Spivey, dated June 13, 2021
- vv. Comment from Rod Stevens, dated June 12, 2021
- ww. Comment from Rod Stevens, dated June 16, 2021
- xx. Comment from Brian Strause and Amy Decker, dated June 18, 2021
- yy. Comment from John Van Dyke, dated June 18, 2021
- zz. Comment from Oriana von Specht, dated June 14, 2021
- aaa. Comment from Kay Walsh, dated June 13, 2021
- bbb. Comment from Janice Wells, dated June 17, 2021
- 10. Statement from Applicant re: Green Roof and Transfer of Development Rights, dated September 2, 2021
- 11. Memorandum from City Development Engineer Paul Nylund re: Recommended Conditions of Approval, dated July 30, 2021
- 12. Email from Rob Grant to Annie Hillier re: question about legal lot status, dated April 26, 2022, with Plat Map
- 13. Site Plan (2 Sheets), dated May 11, 2021
- 14. Survey, dated October 7, 2019
- 15. Applicant Reasonable Use Exception and Variance Criteria Narrative, received April 19, 2021
- 16. Critical Areas Report and Mitigation Plan, Ecological Land Services, revised May 12, 2021

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*

17. Preapplication Letter (File No. PRE12899), dated January 18, 2005
18. Notice of Administrative Decision and Mitigated Determination of Nonsignificance (RUE12899), issued May 3, 2005; Staff Report (RUE12899), dated April 26, 2005, with attached application exhibits
19. City of Bainbridge Island Ordinance 92-07 (Final Environmentally Sensitive Areas Ordinance), dated February 20, 1992, effective March 1, 1992
20. Critical Area Maintenance Agreement (RUE12899), dated February 8, 2006
21. Critical Areas Buffer Notice of Title, dated February 8, 2006
22. Wetland Buffer Mitigation Monitoring Reports (RUE12899), Wiltermood Associates, Inc.:
  - a. Year One Monitoring Report, dated November 30, 2007
  - b. Year Two Monitoring Report, dated December 5, 2008
  - c. Year Three Monitoring Report, dated November 24, 2009
  - d. Year Four Monitoring Report, dated November 8, 2010
23. Letter from Attorney Piper Thornburgh on behalf of Applicant re: request for a continuance of May 10, 2022, hearing date
24. Notice Materials:
  - a. Certificate of Posting (Notice of Application), dated May 28, 2021
  - b. Mailing List
  - c. Affidavit of Publication (Notice of Application), *Bainbridge Island Review*, dated May 28, 2021, with Legal Invoice, Classified Proof, and Accounts Payable Approval Stamp
  - d. Notice of Application Postcards, published May 28, 2021
  - e. Certificate of Posting (Notice of Public Hearing), dated April 22, 2022
  - f. Mailing List
  - g. Classified Proof (Notice of Public Hearing), for publication in *Bainbridge Island Review* on April 22, 2022
  - h. Notice of Public Hearing Postcards
  - i. Notice of Public Hearing Email, dated April 21, 2022
25. Revised Notice Materials
  - a. Affidavit of Publication (Notice of Public Hearing), *Bainbridge Island Review*, dated August 26, 2022, with Legal Invoice and Classified Proof
  - b. Certificate of Posting, dated August 27, 2022
  - c. Mailing List
  - d. Notice of Public Hearing Postcards
  - e. Notice of Public Hearing Email, dated August 26, 2022
26. Notice of Public Hearing Cancellation; Notice of Public Hearing Cancellation Postcards; Mailing List
27. Memorandum from Attorney James E. Haney, Special Counsel to the City of Bainbridge Island, dated September 1, 2022
28. Additional Public Comments received by September 9, 2022:
  - a. Comment from Alice Maher, dated September 8, 2022

*Findings, Conclusions, and Decision*  
 City of Bainbridge Island Hearing Examiner  
 White Reasonable Use Exception and Variance  
 Nos. PLN51498 RUE; PLN51498 VAR

- b. Comment from Pam Churchill, dated September 8, 2022
  - c. Comment from Pam Churchill, dated September 9, 2022
  - d. Comment from Cheryl Laughbon, dated September 9, 2022
  - e. Comment from Chris Laughbon, dated September 9, 2022
  - f. Comment from Attorney Joshua Lane on behalf of Astolfo Rueda, dated September 9, 2022
  - g. Comment from Chris Laughbon, dated September 9, 2022
  - h. Comment from Cheryl Laughbon, dated September 9, 2022
29. City Staff Presentation
30. Additional Public Comments received after September 9, 2022:
- a. Comment from Danni Minter, dated September 10, 2022
  - b. Comment from Cheryl Tlam, dated September 10, 2022
  - c. Comment from Holly Brewer, dated September 11, 2022
  - d. Comment titled “Excepts from Gibson/White File On Monitoring of Remediation and Mitigation Plan,” received September 20, 2022

*Applicant Exhibits*

- A-1. Assessor Record for Parcel No. 4164-006-001-0208
- A-2. Assessor Record for Parcel No. 4164-006-001-0000
- A-3. Commitment for Title Insurance, dated August 24, 2005
- A-4. Plat for Pleasant Beach Tracts, dated July 11, 1913
- A-5. Survey, ADA Engineering, LLC, dated April 4, 2005
- A-6. Email from Annie Hillier to Rob Grant re: question about legal lot status, dated April 25, 2022
- A-7. Email from Annie Hillier to Rob Grant re: question about legal lot status, dated April 26, 2022, with email string
- A-8. Email from Tom White to Dylan Marcus and David Greetham, dated December 13, 2021
- A-9. Draft Staff Report, dated December 23, 2021
- A-10. Email from Annie Hillier to Dylan Marcus, Tom White, and David Greetham, dated March 30, 2022
- A-11. Email from Tom White to Annie Hillier, dated April 20, 2022
- A-12. Email from Annie Hillier to Tom White, dated May 2, 2022
- A-13. Email from Tom White to Annie Hillier, dated April 12, 2022
- A-14. Email from Tom White to Dylan Marcus, dated October 5, 2021, with email string
- A-15. Critical Areas Buffer Notice to Title (online record from City), dated February 21, 2006
- A-16. Building Permit Information (BLD12899SFR), issued June 29, 2006
- A-17. Staff Report, dated May 3, 2022
- A-18. Addendum to Wetland Analysis Report and Buffer Enhancement Plan, Wiltermood Associates, Inc., dated March 1, 2005
- A-19. Email from City Attorney Joe Leven to Attorney Piper Thornburgh, dated May 16, 2022, with email string

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*White Reasonable Use Exception and Variance*  
*Nos. PLN51498 RUE; PLN51498 VAR*

- A-20. Civil Engineering Services Proposal, Browne Wheeler Engineers, Inc., dated April 7, 2022
- A-21. Email from Tom White to Keelin Lacey and Joanne Bartlett, dated May 7, 2021, with email string
- A-22. Revisions to Critical Areas Report and Mitigation Plan, Ecological Land Services, dated May 12, 2021
- A-23. Base Map, AGO Land Surveying, LLC, dated October 7, 2019
- A-24. Email from Tom White to Dylan Marcus, dated November 16, 2021, with email string
- A-25. Kitsap County Assessor Sales History (Parcel No. 4164-006-001-0000)
- A-26. Joanne Bartlett Curriculum Vitae
- A-27. Hydraulic Project Approval, issued May 18, 2005
- A-28. Impact Analysis, Ecological Land Services, dated April 29, 2022

Legal Briefs and Other Pleadings:

- Legal Memorandum from Attorney Haney on behalf of the City, dated September 1, 2022 (Exhibit 27)
- Applicant's Hearing Brief, dated September 6, 2022
- Applicant's Closing Argument, dated September 23, 2022
- Declaration of Applicant Correcting Testimony from Hearing, dated September 23, 2022
- Declaration of Joanne Bartlett in Response to Submission of Comment on September 22, 2022, dated September 23, 2022
- City of Bainbridge Island's Closing Argument, dated September 23, 2022